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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1979**

**No. 79-1382**

STANLEY SWITLIK and RICHARD SWITLIK,

*Petitioners,*

*v.*

HARDWICKE COMPANIES INCORPORATED and GREAT ADVENTURE, INC.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

## RESPONDENT'S BRIEF IN OPPOSITION

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October Term, 1979

No. 79-1382

STANLEY SWITLIK and RICHARD SWITLIK,

Petitioners,

- v. -

HARDWICKE COMPANIES INCORPORATED and GREAT ADVENTURE, INC.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

# RESPONDENT'S BRIEF IN OPPOSITION

Respondent Great Adventure, Inc.,* respectfully opposes the issuance of a writ of certiorari to review the judgment of the

* Respondent Great Adventure, Inc. is successor in interest by merger and by change of name to both Great Adventure, Inc., which operated the Great Adventure park, and Hardwicke's New Jersey Preserves, Inc., which owned the underlying land. Both corporations were at the time of the commencement of the lawsuit owned by Hardwicke Companies Incorporated ("Hardwicke"), also a respondent-cross-

(Footnote continued on following page)

Superior Court of New Jersey, Appellate Division, entered in this case on May 31, 1979.*

RESTATED QUESTION PRESENTED NO. 1**

In determining liability for the tort of malicious interference with prospective economic advantage, does the First Amendment preclude consideration of maliciously motivated and unjustified acts intended to cause material injury if such acts could otherwise arguably be within the ambit of protected speech?

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(Footnote continued from preceding page)
appellant below, but have since been sold. Throughout this brief, both of respondent's predecessors will be referred to as "Great Adventure". Hardwicke's claim against the Switliks was denied by the Trial Court and that denial was affirmed by the Superior Court of New Jersey, Appellate Division. Hardwicke is captioned as a respondent herein because of its interest in the Appellate Division proceedings (U.S. Sup. Ct. R. 21(4)) but it files no brief herein. Others who were named as defendants were either never served or were dismissed from the lawsuit and they are not captioned as respondents.

* The New Jersey Supreme Court denied a petition for certification to review that Appellate Division judgment and subsequently denied a motion to reconsider that denial of certification (Petition, Apps. D and E).

** Question Presented No. 2 has not been restated.



STATEMENT OF CASE

The salient facts are set forth to correct substantially misleading statements in, and material omissions from, the petition.

This is essentially a case of common law fraud by petitioners Stanley Switlik and Richard Switlik and the enormous damages which were the consequences of that fraud (damages awarded for fraud were in the sum of $4,912,043*); and Richard Switlik's interference with Great Adventure's contract rights and the substantial damage which resulted therefrom (damages awarded for interference with contract rights were in the sum of $1,318,511*). The case also involves tortious interference by Richard Switlik with Great Adventure's economic expectancy for which relatively little damages were awarded ($117,053*)

The petition nowhere advises this Court that the fraud of Stanley Switlik had been determined in a prior trial and affirmed on appeal prior to the second and third trials which are the subject matter of the petition. No application for further review of that initial finding of fraud was made to the Supreme Court of New Jersey or to this Court and that finding of Stanley Switlik's fraud is res judicata.

This case presented the Trial Court

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* Figures include pre-judgment interest.

with the straightforward task of applying essentially uncontroverted facts to generally accepted principles of law to determine: (1) the amount of damages to be assessed against Stanley Switlik for his previously finally adjudicated fraud; (2) whether fraud and malicious interference with contract rights and with prospective economic advantage had been proven against Richard Switlik; and (3) once liability of Richard Switlik was found, assessing the amount of damages caused by his fraudulent and malicious conduct.

There is nothing raised by petitioner, and nothing in this case, to satisfy the criteria of this Court's Rule 19 for the grant of a writ of certiorari. There are no "special and important reasons" for such a grant. There is no "federal question of substance" involved. Rather, the case centered around the sale by Stanley and Wanda Switlik of a large portion of their New Jersey estate to Great Adventure for development as a multi-million dollar wild animal safari and entertainment park, a fraud relating to that sale, interference by Richard Switlik with the contract of sale, and malicious interference by Richard Switlik with the development of the park. The only unusual feature of the case is the enormity of the fraud perpetrated by petitioner.



The Lot 10C Fraud

The fraud related to a triangular-shaped parcel of land called Lot 10C which was so located as to substantially cut across the land being sold to Great Adventure at its narrowest point. Prior to the sale, Stanley Switlik and his son, Richard Switlik, in order to induce Great Adventure to exclude Lot 10C from the property being purchased from Stanley Switlik, had represented Lot 10C as not being owned by Stanley Switlik but rather as having been conveyed by Stanley Switlik to the State of New Jersey years before. Great Adventure was taking steps to obtain title from the State of New Jersey. Unknown to Great Adventure, while the deed conveying the Switlik lands to Great Adventure was still in escrow pending the completion of the closing of title, Richard Switlik obtained and caused to be recorded an acknowledgment from the State of his father's "ownership" of Lot 10C in the form of a "corrected deed". Shortly after the sale was complete, Stanley Switlik announced that he was the owner of Lot 10C.

Because of its location, the ownership of Lot 10C by a party hostile to development of the park would have prevented the park from being built. The sudden post-closing claim of the Switliks to ownership of Lot 10C,

therefore, forced Great Adventure to hold back construction of the most costly portion of the park until the Lot 10C problem was resolved. The forced hold back resulted in substantial damage in the form of increased construction costs and lost profits.

Interference With Contract

Stanley and Wanda Switlik had contracted in 1972 to sell a substantial portion of their property in Jackson Township, New Jersey to Great Adventure. As a result of interference by Richard Switlik, their son who had expected to inherit his parent's property, there were problems with the transaction beginning nine months after their contract was signed. The eventual closing of title resulted only after Great Adventure was forced to bring a specific performance action because Stanley and Wanda Switlik refused to honor the contract of sale of the property. While his parents were away at their winter home in Florida, Richard Switlik, attempted on his own to change the terms of his parent's contract of sale with Great Adventure in a number of material respects. When Great Adventure would not accede to his demands, Richard Switlik convinced his parents to breach the agreement.

Although a specific performance suit



was brought by Great Adventure, it had to be settled by a closing of title on terms unfavorable to Great Adventure in order to avoid further delay. The reduced benefits so received resulted in substantial damages to Great Adventure which had proceeded with its development efforts in reliance on the terms of the original contract. These damages were awarded to Great Adventure in connection with the finding of Richard Switlik's liability for malicious interference with Great Adventure's contractual relations.

Interference With
Prospective Economic Advantage

Aside from his fraud and malicious interference with the contract, the acts of malicious interference with Great Adventure's prospective economic advantage committed by Richard Switlik and proved at trial, included:

(a) inducing a third party to object on his behalf to Great Adventure's application for a zoning variance so that it would appear that the objection was being made by a Girl Scout Council;

(b) nocturnal pulling of survey stakes and dumping of sand in a drainage ditch to impede construction;

(c) arranging financing for a lawsuit by neighboring municipalities attacking Great Adventure's municipal approvals;

(d) attempting to cause the New Jersey Fish & Game Commission to prevent fencing of the animal park by declaring a deer run across the park thereby again attempting to cause the park to be bifurcated; and

(e) purchasing land in the name of a nominee for the purpose of bringing a legal proceeding ostensibly by a land-locked third party, to open by injunction an allegedly public stage coach road across the park.

After the sale, Stanley Switlik also disputed the location of an exterior boundary of the land he had conveyed. He commenced this suit against Great Adventure and Hardwicke first claiming trespass and later amending his claim to include reformation of the deed. Great Adventure and Hardwicke counterclaimed in this litigation to obtain title to Lot 10C and, adding Richard Switlik as a party, immediately counterclaimed against petitioners for the damages caused by the Switliks fraud as to Lot 10C. Additional claims were asserted against Richard Switlik because he had induced Stanley Switlik to breach the original contract of sale and had otherwise maliciously interfered with Great



Adventure's business for his own pecuniary ends.

Prior to the first trial, the results of which include the finding of Stanley Switlik's fraud and are not the subject matter of this petition, the Trial Court determined to initially try the issues relating to title, leaving the damage claims of both sides for future trial. After a lengthy trial, the Honorable Mark Addison found, among other findings, that Stanley Switlik had defrauded Great Adventure regarding the ownership of Lot 10C and imposed a constructive trust requiring its conveyance by Stanley Switlik to Great Adventure. That decision was unanimously affirmed by the Appellate Division of the Superior Court on February 2, 1976, and further review either to the Supreme Court of New Jersey or to this Court was not sought.

Trial of the remaining issues, i.e., Richard Switlik's liability for fraud, malicious interference with contract, and malicious interference with prospective economic advantage and the quantum of damages to be assessed against both Switliks, was bifurcated. The remaining questions of liability were tried before a different trial Judge (Honorable Robert H. Doherty, Jr.). After the second trial, Judge Doherty found

that Richard Switlik was also liable for the Lot 10C fraud, and was liable as well for his malicious interference with Great Adventure's contractual rights and for his malicious interference with Great Adventure's economic expectancy (Petition, App. A). The damage trial was subsequently conducted before Judge Doherty who awarded the aforesaid damages in favor of Great Adventure. Judge Doherty rejected substantial other damage claims of Great Adventure and all damage claims of Hardwicke (Petition, App. B).

After review of the entire record, the findings of Judge Doherty were unanimously affirmed by the Appellate Division of the Superior Court of New Jersey (the cross-appeals of Great Adventure and Hardwicke as to rejected damage claims thereby being denied), the Appellate Division stating that:

> "[T]he judgments of the trial court is [sic] based on findings of fact which are adequately supported by the evidence; the determination of the trial court on the motion for a new trial does not constitute a manifest denial of justice, and that all issues of law raised are clearly without merit. R.2:11-3(e)(1)(A),(C) and (E)." (Petition, App. C)

Petitioners then petitioned the Supreme Court of New Jersey for certification to review that Appellate Decision determination, which petition was denied (Petition, App. D). A subsequent motion by the Switliks



seeking reconsideration of the denial of certification was also denied by the Supreme Court of New Jersey. (Petition, App. E)

## REASONS FOR DENIAL OF WRIT

### A. The Petition Does Not Meet The Criteria of Rule 19 For a Grant of Certiorari

This is a case of fraud and malicious interference in connection with a land transaction. The finding of fraud by one petitioner -- Stanley Switlik -- is res judicata and not even before this Court. There are no "special and important reasons" for a grant of certiorari. There has been no decision of "a federal question of substance not theretofore determined by this court" nor has any federal question of substance been "decided . . . in a way probably not in accord with applicable decisions of this court." U.S. Sup. Ct. R. 19(1)(a). In fact, no federal question of substance is even presented by the petition and there is nothing raised by petitioners to satisfy the test of Rule 19 of this Court. Even if a constitutional issue really was presented by the petition, this would be an inappropriate case for a grant of certiorari because, as stated by Chief Justice Vinson in Rice v. Sioux City Memorial Park

Cemetery, 349 U.S. 70 (1955):

> "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." 349 U.S. at 74.

B. The Alleged "Free Speech Issue" Is Not An Issue of Importance In This Case and Could Not Taint The Wholly Independent Findings of Fraud and Malicious Inteference With Contract

Petitioners contend that certiorari should be granted primarily because the adjudication of liability against Richard Switlik for damages for his interference with Great Adventure's prospective economic advantage violates the First Amendment to the United States Constitution in that such finding of liability allegedly inhibits "free speech".* Recognizing that this argument,

* This so-called "free-speech" argument which Richard Switlik is now emphasizing played a minimal role in the appeal of this case up to the time of the petition (Petition, pp. 9-14). It consumed seven pages of the Switliks' 124 page brief to the Appellate Division of the Superior Court and was not even raised in their petition for certification to the Supreme Court of New Jersey or in their motion to that Court for reconsideration of its denial of certification.



even it had merit which it does not, would affect only the damage award of $117,053 and not the damage awards of $4,912,043 (fraud) and $1,318,511 (malicious intereference with contract), the Switliks further argue that the alleged First Amendment violation somehow tainted the entire case including, at least by implication, the finding of Stanley Switlik's fraud which has already been finally adjudicated and is res judicata. Neither argument has merit.

(a) Consideration of the issue of Richard Switlik's malicious interference with prospective economic advantage involved a determination by the Trial Court that the acts of Richard Switlik were predominantly, if not solely, motivated by malicious purposes, and thus satisfied the requirement of legal malice. The evidence of Richard Switlik's appearances before the Planning Board and the multitude of letters sent by him to various governmental agencies (including his efforts to have a deer run declared by the State to prevent fencing of the animal areas), to which the petition refers, was neither offered nor received as evidence of wrongdoing but solely for the purpose of tending to prove Richard Switlik's malicious motivation with respect to conduct which was wrongful. Thus,

this evidence was not the subject of any damage award.

Moreover, the argument at best presents a factual issue resolved at trial against petitioner Richard Switlik. The trial proof overwhelmingly demonstrated that Richard Switlik's acts of interference were intended to interfere, thus creating a prima facie case of malicious interference which Richard Switlik could have rebutted as a factual matter by showing that the acts were justified. 1 Harper and James, The Law of Torts, Section 6.12, page 514 (1956); see also Prosser, The Law of Torts, Section 129, p. 942 (4th Ed. 1971). Indeed, the entire thrust of Richard Switlik's defense below was that his interference was justified by his status as an adjoining landowner. He failed, however, to carry that burden chiefly because there was nothing in the record to suggest that he was motivated by concern about his adjoining property. Rather, his acts were shown to be part of a pattern of conduct calculated to stop development of the park by any means possible because he disagreed with his father's decision to sell the land he expected to inherit, because he grew to intensely dislike management of Great Adventure, and because he wanted the location of the land to be shifted on to the less desirable land to the east which he at-



tempted to sell to Great Adventure. Many of Richard Switlik's activities were characterized by trespass and subterfuge and none could be said to be limited to "reasonable and proper means." Prosser, The Law of Torts, Section 129, p. 936 (4th Ed. 1971); Lewis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 A. 62 (E.&A. 1934).

Liability for unjustified acts of maliciously motivated interference otherwise lawful is consistent with existing common law in New Jersey (Middlesex Concrete Corp. v. Carteret Indust. Association, 39 N.J. 507, 189 A.2d 213 (1962)), and elsewhere (Prosser, The Law of Torts, §129, pp. 943 et. seq. (4th Ed. 1971); Beane v. McMullen, 265 Md. 585, 291 A.2d 37 (Ct. App. 1972); see Culcal Sylco, Inc. v. Vornado, Inc., 103 Cal. Rptr. 419, 26 Cal. App. 3d 879 (Ct. of Appeals 1972); and such law adequately protects justifiable governmental protest for proper purposes. Moreover, maliciously motivated litigation has never been permitted to exist free of restraint, malicious prosecution and abuse of process being traditionally recognized as grounds for civil liability. Prosser, The Law of Torts §120, pp. 850 et. seq. (4th Ed. 1971). Similarly, the First

Amendment does not protect unlawful end results, such as violation of the anti-trust laws, even where the means used in the violation would otherwise be lawful; and, most importantly, "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' [citation omitted] which the legislature has the power to control." California Transport v. Trucking Unlimited, 404 U.S. 508, 515 (1971). As indicated, petitioner Richard Switlik's real problem was rather that, as on the more significant issues in the case, he failed to satisfy the trier of fact that his acts of interference were for a proper purpose. He now presents purported First Amendment rights as the very "pretext" warned against in California Transport, to justify the substantive evils which he maliciously caused to Great Adventure.

Boiled down to its essence, the issue of alleged First Amendment dimension presented by the petition involves really nothing more than an evidentiary principle relating to proof of the common law tort of malicious interference with prospective economic advantage. It certainly presents no issue of importance which should be cognizable before this Court. Even as a question of evidence, there



is nothing unusual about this case. A person's motive, like any other issue, can be proved indirectly by his conduct regardless of the legality of that conduct. As with intent, motive is rarely established by other than circumstantial evidence. For this reason, all evidence of Richard Switlik's malicious attitude toward Great Adventure was probative of his motivation in performing unlawful acts which interfered with Great Adventure's development efforts.

(b) The judgment for damages caused by the fraud was so adjudicated and is wholly unaffected by the so-called "free-speech" argument. Similarly, the arguments now emphasized as grounds for certiorari in no way affect the judgment awarded for Richard Switlik's malicious interference with contractual relations. The findings of Richard Switlik's liability for fraud and malicious interference with contract are wholly independent of the separate finding of his liability for malicious interference with prospective economic advantage. The damage findings for each tort were also arrived at based upon specific and detailed evidence relating losses and expenses incurred to the particular conduct for which liability was found. This is best demonstrated by the fact that Stanley Switlik's fraud was adjudicated in the first trial be-

fore Judge Addison at which trial questions of Richard Switlik's malicious interference with prospective economic advantage were not even considered. The suggestion of some over-all "taint" in the context of this massive non-jury litigation is plainly specious. Even in a jury case this argument would have been frivolous.

C. The Trial Court Decisions Raise No Issues of Due Process Under The Fourteenth Amendment

The only other issue raised by Petitioners is with respect to the quality of the Trial Court conclusions, advanced as an alleged deprivation of due process (Petition, pp. 22-24). While petitioners did complain of the absence of legal citation by the Trial Court on their appeal to the Appellate Division, this due process argument was first asserted only on their motion for reconsideration of the New Jersey Supreme Court's denial of certification. This Court will normally not consider issues which have not been presented in the courts below. Cardinale v. Louisiana, 394 U.S. 437 (1969). In any event, both as an issue of due process and as a matter of New Jersey law, this claim is clearly frivolous.

Petitioners contend that Rule 1:7-4



of the New Jersey Rules of Court sets forth the minimum standards of due process. Yet the opinions rendered by the Trial Court clearly fit within the standards of that Rule which requires only that the court "find the facts and state its conclusions of law thereon." R.1:7-4 (emphasis added). As is evident from review of the Trial Court opinions, Judge Doherty found the facts and stated conclusions of law based on those facts. Petitioners have had no problem on appeal in identifying and presenting arguments in respect of the factual findings and legal conclusions which are not in their favor.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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